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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1530

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Petitioners,

—against—

ARROW ELECTRONICS, INC. and STATE OF NEW YORK,

Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT ARROW ELECTRONICS, INC.

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A. Re: Respondent's argument that the statute deprives Petitioners of no procedural due process.

(1) At pages 6 and 7, Respondent states that "petitioners challenge the validity of a statutory scheme that they themselves voluntarily invoked to obtain a benefit—the right of an appraisal—not available to shareholders at common law"; and that, therefore, the case at bar is different from

those which involve "deprivations of property as a consequence of acts initiated by someone other than the complaining party."

Respondent is in error. Petitioners "did not themselves voluntarily invoke" the statutory scheme. Petitioners did not initiate the merger. Rather, it is the Respondent who initiated the merger and the procedures under BCL §623. It is the Respondent who invoked the statutory scheme to obtain a benefit not available to it under the common law. It is the Respondent who sought to merge with its newly created, wholly owned Delaware corporation with no assets, so that it would no longer be subject to New York laws. By virtue of the statute, Petitioners' status as shareholders was converted to that of monetary claimants for the value of their shares. When Respondent failed to commence the statutory judicial proceeding to determine the rights of Petitioners, Petitioners were compelled by the statute to do so to preserve their rights. The judicial proceeding was but one step in the statutory scheme invoked by Respondent. Had the Petitioners failed to commence the judicial proceeding under BCL §623(h), they would have lost their rights to receive the fair value of their shares. BCL §623(h)(2).

(2) Respondent further contends at page 7 that BCL §623 is replete with provisions for plenary adversary hearings from beginning to end. This is so when there has been no abandonment of the corporate merger. However, it is not so when the corporation abandons the merger. Upon abandonment, the adversary judicial proceeding terminates, and the statute makes no provision for any relief

to the dissenting shareholders. The judicial control ends with the abandonment.

B. Re: Respondent's argument that the statute deprives Petitioners of no substantive rights

(1) At pages 7 and 8, Respondent states that upon abandonment the dissenter is reinstated to all his rights as a shareholder. Respondent refuses to face the facts and meet the issue. Reinstatement to shareholder status did not restore the dissenters to the position they were in when they dissented. Months elapsed. Their shares declined in value and price. During this period they had no vote as shareholders. They had no control over their investment. Their shares could not be traded. They were put to the expense of commencing the statutory judicial proceeding. The statute, as construed by the State court, terminated the judicial proceeding and denied them all relief when Respondent abandoned the merger.

(2) Respondent states that "dissenting shareholders are not prohibited—by reason of their dissent—from selling their shares prior to the consummation or abandonment of proposed corporate action." Nevertheless, the transferee takes subject to the statutory legend endorsed on the certificate. He obtains no greater rights than the transferor. He has no control of his investment. He has no shareholder status. If there should be a rise in the price or value of the shares, the Respondent would proceed with the merger; if there should be a decline, Respondent would abandon the merger. The transferee would take the shares, subject to Respondent's corporate game of "heads I win, tails you lose."

C. Re: Respondent's argument that "State action" is absent.

Respondent argues at page 11 that, unlike the utility company in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), Respondent "is not subject to a pervasive regulatory scheme of the sort that governs electric companies; rather, New York's involvement in Arrow's activities differs not at all from the state's role in the affairs of any profit-making corporation that it charters."

Respondent is in error. What we particularly are concerned with is the State's involvement with a corporate merger. It is the State which made possible a corporate merger by enacting the "statutory scheme." The State mandated that rigid procedural requirements be complied with by a non-assenting shareholder. The State also provided for an abandonment of the corporate merger. Respondent could not have acted and would not have acted except by virtue of the statute.

Toward the bottom of page 11, Respondent states that it "was not Arrow, the defendant, who sought the benefit of the statutory scheme about which petitioners now complain, but the Goldbergs, themselves, who first chose to dissent and then elect to bring suit to enforce their dissenters' rights."

Again the Respondent is in error. It is the Respondent who sought the benefit of the statutory scheme. It is the Respondent who invoked its provisions by giving the requisite notice (5a, 16a). Petitioners' commencement of the statutory judicial proceeding was necessitated by reason of the failure of the Respondent to commence such proceeding. BCL §623(h)(2)

D. Re: Respondent's statement that the State courts "rejected" Petitioners' contention that the statute is unconstitutional.

At page 5, Respondent states that on the Petitioners' appeal to the Appellate Division and then to the Court of Appeals of the State of New York, those courts "rejected their claims, including their contention that BCL §623, as construed by the Appellate Division, is unconstitutional." Respondent is in error. Neither the Appellate Division nor the New York Court of Appeals entertained or passed upon the constitutionality of the statute (175a, 151a, 177a; 33 N.Y.2d 1004, 353 N.Y.S.2d 966; 34 N.Y.2d 515, 356 N.Y.S.2d 1025). Had those courts ruled on the constitutional question, an appeal would have been taken directly from such ruling to this Court. Because they had not done so, this 42 U.S.C.A. §1983 action was commenced in the United States District Court.

Respectfully submitted,

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